and below to the appellant, set aside the order of the learned judge and issued certiorari to quash the award of the Industrial Court, and directed that the deposit lodged in court by way of security be paid out to the appellant.

*Appeal allowed.*

Solicitors: *TM Varghese & Co; Genga Maha Wong & Co.*

Reported by *Prof Ahmad Ibrahim*

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## Tan Hong Pui & Anor v Tan Guet Yiang & Anor

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 301 OF 1986
LEE HUN HOE CJ (BORNEO), HASHIM YEOP A SANI AND WAN HAMZAH SCJJ
13 FEBRUARY AND 4 JUNE 1987

*Contract – Land purchase – Agreed instalment paid to solicitor for both parties – Money not paid to vendor but paid to credit of loan account with bank – Claim for specific performance*

The respondents had agreed to buy from the appellants a piece of land in Pontian free from encumbrances. It was agreed that the respondents would pay $26,000 at the time of entering into the agreement and thereafter pay instalments of $40,000 by 30 April 1982, $74,000 by 28 May 1982, and the balance of $120,000 on 28 May 1982, or when the respondent's bank loan is approved. At the time of the agreement, the land had been charged but no reference to the charge was made in the agreement. There was no dispute regarding the payment of the $40,000 but there was a dispute regarding the next instalment of $74,000. The appellants purported to terminate the agreement on the ground of non-payment of the $74,000 instalment. The respondents alleged that the money had been paid before the due time to the solicitor for both parties. This was admitted by the solicitor but he said he did not pay the money to the appellants but instead paid it to the credit of the loan account with the bank in order to reduce the amount owing on the charge. The respondents applied for specific performance of the agreement and this was granted by the trial judge. The appellants appealed.

**Held,** dismissing the appeal: It is clear in this case that the respondents paid the instalment of $74,000 before the date on which it was due and that the solicitor received it on behalf of the appellants. The respondents were therefore entitled to specific performance of the agreement.

*GS Nijar* for the appellants.
*Ho Thian Cheh* for the respondents.

Cur Adv Vult

**Wan Hamzah SCJ** (delivering the judgment of the court): The respondents (plaintiffs) entered into a written agreement dated 27 March 1982, with the appellants (defendants) to buy from the latter land lot no PTB 4986, town of Pontian, at the price of $260,000 free from registered encumbrances. At the time of entering into the agreement, a sum of $26,000 was paid and the agreement provides that the balance of $234,000 of the price should be paid as follows:

(a) $40,000 by 30 April 1982.
(b) $74,000 by 28 May 1982.
(c) $120,000 on 28 May 1982 or when the plaintiffs' bank loan will be approved.

The agreement provides that time shall be of its essence. At the time when the instalment of $74,000 became due on 28 May 1982, the land had been charged. It is not clear when the charge was registered. No reference to the charge was made in the agreement. There is no dispute between the plaintiffs and the defendants as regards the payment of the instalment of $40,000 but there is a dispute regarding the payment of the next instalment of $74,000. By letter dated 3 June 1982, the defendants purported to terminate the agreement on the ground of non-payment of the $74,000 instalment. In the statement of claim, the plaintiffs allege that Messrs Kumpulan Gan & Lim, advocates and solicitors, were acting for both the plaintiffs and the defendants and that on 28 May 1982, they (the plaintiffs) paid to Messrs Kumpulan Gan & Lim the instalment of $74,000. The plaintiffs pray for order of specific performance of the agreement. In their statement of defence, the defendants admit that the solicitors were common solicitors but allege that the plaintiffs failed to pay them the instalment of $74,000 on the due date and they (the defendants) granted an extension of time till 31 May 1982 for the payment but the plaintiffs again failed to pay by that date. Yusoff Mohamed J in the High Court held that the plaintiffs were entitled to the order of specific performance. Hence this appeal by the defendants.

At the trial Mr Gan Kim Seng, advocate and solicitor of the firm of Messrs Kumpulan Gan & Lim, gave evidence. He stated that he acted for both the plaintiffs and the defendants in the agreement. He testified that on 27 May 1982, he received the payment of the $74,000 from the plaintiffs' husband, in two cheques, a local cheque of $40,000 and an outstation cheque of $34,000 and paid the amount into the bank to the credit of his clients' account. Pay-in slips and the bank statement were produced showing that the two cheques were credited to the clients' account on 28 May 1982. He stated that he received the cheques on behalf of the defendants. He admitted that on 29 May 1982, the first defendant came to his office and asked him for payment but he did not pay the sum to him and told him that he would instead pay the amount to the credit of the loan account in Chung Khiaw Bank in order to reduce the amount of about $120,000 owed on the defendants' charge. Para-

graph 10 of the statement of claim contains an averment about the proposal that the sum of $74,000 be paid to Chung Khiaw Bank in partial redemption of the charge on behalf of the defendants or alternatively the said sum be released to them on their solicitor giving an undertaking to redeem the charge. When giving evidence, Mr Gan stated that the plaintiffs had not instructed him to use the sum of $74,000 paid by them to reduce the amount outstanding on the charge. This statement of Mr Gan implies that the said averment in para 10 of the statement of claim was his own idea and it was not made on the instruction of the plaintiffs.

It is clear from the evidence that the plaintiffs paid the instalment of $74,000 before the date on which it was due. It is also clear that Mr Gan received it on behalf of the defendants. Although Mr Gan refused to release the sum to the defendants, this does not mean that the plaintiffs had failed to pay when the instalment was due. The plaintiffs had nothing to do with Mr Gan's refusal and their position was not affected by it. Mr Gan had acted on his own and not on the instruction of the plaintiffs when he declined to pay. Mr Gan's refusal to pay was a matter between the defendants and their solicitor, Mr Gan. We do not wish to express any view as to whether Mr Gan had the right to refuse to pay over the sum to the defendants or to use it for the purpose of reducing the amount outstanding on the charge. That question is not the issue in this case.

It was submitted on behalf of the defendants that since the $34,000 cheque was an outstation cheque, it would take a few days to be cleared and therefore it cannot be said that the amount was paid on the due date. In our judgment, the answer to this point can be found in Mr Gan's evidence where he stated that there was an arrangement between him and the bank whereby it would credit his clients' account immediately without waiting for the clearance of the outstation cheque. Therefore we agree with the judge that the plaintiffs are entitled to specific performance of the agreement, although on different grounds.

This appeal is dismissed with costs, and the deposit should be paid out to the respondents (plaintiffs) on account of the costs.

*Appeal dismissed.*

Solicitors: *Nijar & Nijar*; *Ho Thian Cheh & Co.*

Reported by *Prof Ahmad Ibrahim*

## Automobiles Peugeot SA v Asia Automobile Industries Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION NO D2-33-10-87
SITI NORMA YAAKOB J
4 AUGUST 1988

*Companies and Corporations – Minority shareholder instituting proceedings against directors – Whether need to file derivative action – Whether derivative action would amount to duplicity of actions – Companies Act 1965, s 181(1), (2)*

In this case, the second respondent raised objections to the petitioner's application to amend the petition by the addition of another prayer. The additional prayer sought to make the second respondent personally liable to pay damages to the first respondent for alleged breaches of his fiduciary duties as a director of the first respondent. The second respondent contended that the petitioner, being only a minority shareholder of the first respondent, cannot question acts done by him as the director of the first respondent for the reason that if a majority of the shareholders of the first respondent is in favour of what he has done, the petitioner's right to question such action no longer exists. The second respondent submitted that the petitioner had to file another writ by way of a derivative action.

**Held,** dismissing the objections: Since there is now statutory sanction (under s 181(1) and (2) of the Companies Act 1965) for a shareholder with a minority interest in a company to institute proceedings against directors conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner as that would amount to a duplicity of actions relating to the same subject matter.

**Cases referred to**
1 *Foss* v *Harbottle* (1843) 2 Hare 461; 67 ER 189 (not folld)
2 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (refd)

**Legislation referred to**
Companies Act 1965 s 181(1), (2)

*Chua See Hua* for the second respondent/appellant.
*Loh Siew Cheong* for the petitioner/respondent.

*Cur Adv Vult*

**Siti Norma Yaakob J:** The only objection raised by the second respondent to the petitioner's application to amend the petition is the addition of another prayer to the petition that seeks to make him personally liable to pay damages to the first respondent for alleged breaches of his fiduciary duties as a director of the first respondent.

He questions the locus standi of the petitioner as he maintains that the proper plaintiff, in an action of any alleged wrong done by him to the first respondent should be the first respondent itself. Moreover, being only a minority shareholder of the first respondent, the petitioner cannot question acts done by him as the director of the first respondent for the simple reason that if a major-